IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANN McARDLE	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 99-4273
THE HARTFORD INSURANCE	:	
COMPANY OF THE MIDWEST	:	
	:	
Defendant.	:	

M E M O R A N D U M

BUCKWALTER, J. March 22, 2000

Presently before the Court are the Summary Judgment Motions of both Plaintiff and Defendant. For the reasons given below, the Motion of Defendant is Granted and the Motion of the Plaintiff is Denied.

I. FACTUAL BACKGROUND

Defendant Hartford Insurance Company of the Midwest ("Hartford") issued to Plaintiff Ann McArdle ("McArdle") homeowner's insurance policy 55-RBA617215 (the "Policy") for the coverage period October 5, 1996 to October 5, 1997. In December, 1996, McArdle discovered that several parts of her house had sustained damage. The damage consisted of 1) cracks in and separation of internal walls and ceilings ("Internal Cracks"), 2) cracks in the external staircase ("Staircase Cracks"), and 3) cracks in the external walls ("external cracks"). In late February, 1997, McArdle submitted a claim to Hartford under the Policy (the "Claim"). Hartford assigned claim service representative Chris Correll to McArdle's claim ("Correll"). Mr.

Correll, in turn, assigned Crawford and Company to investigate McArdle's claim. The report of Crawford and Company was inconclusive as to cause of damage to McArdle's home. In April, 1997, Correll engaged the engineering firm, National Forensic Consultants ("NFC"), to further investigate the Claim. At the same time, Correll informed McArdle by letter that Hartford reserved all of its rights under the Policy. After receiving the report of NFC as to the causes of the damage to McArdle's house, Mr. Correll informed McArdle that her Claim was not covered under the Policy (the "Denial Letter"). The Denial Letter was dated July 30, 1997 and listed three specific provisions which excluded the Claim from coverage. The Denial Letter did not mention the Water Damage Exclusion as a basis for denial. Soon afterwards, McArdle engaged Jamison Contractor, Inc. ("Jamison") to investigate and repair the water infiltration and structural integrity of her property. Jamison's services cost McArdle $16,300. McArdle filed a two count complaint on July 27, 1999. The first count was for breach of contract and the second was for a bad faith denial of insurance benefits.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(c), the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d. Cir.1992). In evaluating a summary judgment motion, the court may examine the pleadings and other material offered by the parties to determine if there is a genuine issue of material fact to be tried. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The movant "bears the initial responsibility of informing the court of the basis for its motion, and identifying those

portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact". Celotex, 477 U.S. at 323. When movants do not bear the burden of persuasion at trial, they need only point to the court "that there is an absence of evidence to support the non-moving party's case. Id. at 325. A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). For the dispute over the material fact to be genuine, "the evidence must be such that a reasonable jury could return a verdict in favor of the non-moving party." Id.

III. DISCUSSION

A. Breach of Contract Claim

1. Untimeliness of the Claim

Hartford argues that McArdle's breach of contract claim should be barred as untimely. It is undisputed that the Policy contained a one-year limitation on suit against Hartford. It has long been settled that contractual provisions requiring that claims be brought within a shorter time period than called for by the applicable statute of limitations will be upheld if not unreasonable. See, Marshall v. Aetna Casualty & Surety Co., 643 F.2d 151 (3d. Cir. 1981). McArdle makes two arguments against the application of the one-year limitation. The first is that Pennsylvania law is ambiguous as to whether such a limitation can be validly placed in a property insurance policy. The second argument is that it would be unconscionable for a Court to strictly apply the one year suit limitation and prevent her from bringing suit because she never had any knowledge of such a provision.

a. One year limitation

As for a one-year limitation on suits, the law is clear that such a clause, setting time limits upon the commencement of suits to recovery on a policy, is valid and will be sustained. See General St. Auth. v. Planet Ins. Co., 346 A.2d 265, 267 (1975); Lardas v. Underwriters Insurance Co., 426 Pa. 47, 231 A.2d 740 (1967). Policy provisions requiring that suits be brought against insurers within twelve months of the insured's discovery of harm have consistently been upheld in Pennsylvania courts. See Fennel v. Nationwide Mutual Fire Ins. Co., 603 A.2d 1064, 1068 (Pa. Super. 1992); World of Tires, Inc. v. American Insurance Co., 360 Pa. Super. 514, 521, 520 A.2d 1388, 1391 (1987) (twelve-month time limit is applicable absent actions by insurer which lead insured to believe that provision will not be enforced); Hospital Support Services, Ltd. v. Lumbermens Mut. Cas. Co., 1989 WL 32771 at *4 (E.D. Pa. April 3, 1989)(12 month limitation clause enforceable although not mandated by statute). This Court also agrees with Judge Bartle's opinion in McElhiney v. Allstate Ins. Co., 33 F.Supp.2d 405 (E.D. Pa. 1999). The plaintiff in that case claimed that 40 Pa. C.S.A. § 753 required a three year limitations period for bringing suits under a homeowners insurance policy despite the policy's express clause to the contrary.[1] Judge Bartle found that § 753 only applies to "Health and

1. 40 Pa. C.S.A. §753 provides in relevant part:
(A) Required Provisions ... [E]ach such policy delivered or issued for delivery to any person in this Commonwealth shall contain the provisions specified in this subsection....
(11) A provision as follows:
Legal Actions: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

Accident Insurance" policies, and not to homeowner's policies.[2] Since the Policy in this case is very similar to the policy purchased by the McElhineys, the Court finds the one year suit limitation provision is adequate and applies to the Policy.

b. Awareness of the one year statute of limitations by McArdle

The Supreme Court of Pennsylvania has previously rejected the rationale that; "the burden of establishing the applicability of the exclusion or limitation involves proof that the insured was aware of the exclusion or limitation and that the effect thereof was explained to him." See Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). The Venetian Court found that such an interpretation would permit an insured to avoid the application of a clear and unambiguous limitation clause in an insurance contract. Id. In other words, the Venetian Court established a duty to read and understand the terms of an insurance policy. However, the Court noted that "in light of the manifest inequality of bargaining power between an insurance company and a purchaser of insurance, a court may on occasion be justified in deviating from the plain language of a contract of insurance. See, 13 Pa. C.S.A. § 2302 (court may refuse to enforce contract or any clause of contract if court as a matter of law deems the contract or any clause of the contract to have been "unconscionable at the time it was made").

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2. 40 Pa. C.S.A. § 751, originally enacted, refers only to policies of insurance against loss from sickness or damage from bodily injury or death of the insured by accident. These are the type of policies meant by the "such policy" language of § 753 above.

§ 751 has been repealed as of February 17, 1997. But as Judge Bartle wrote in McElhiney, the repeal should not affect the analysis. First, the repeal was not effective until after the Policy had been issued and has no retroactive effect. Secondly, it is clear that the other required provisions of § 753 only make sense in terms of policies covering bodily injury and sickness. The provisions required in § 753(A) would not appropriately apply to a property insurance policy.

McArdle distinguishes her case from Venetian by relying on Tonkovic v. State Farm Mut. Auto. Ins. Co., 521 A.2d 920 (Pa. 1987). The insured in that case claimed that the insurer unilaterally changed the terms of the policy he had sought, and then failed to notify him of such a change. The Tonkovic Court only relieved the insured from its duty of knowing the terms of the policy because it found that the insurer had unilaterally changed a term which the insured had specifically requested. Under the circumstances, the court found that it would be unfair to hold the insured to the terms of a policy containing terms different from what had been agreed upon when the insured had never received notification of such a change. Id. at 925.

Hartford's standard operating procedure is to forward a complete policy, including all forms and endorsements, along with the declarations sheet(s), to an insured in Pennsylvania at the time a policy is originally issued ("HO-3"). Hartford does not resend forms or endorsements, without request, unless changes have occurred in the interim. McArdle affirms that she did receive subsequent updates and revisions to her Policy, but states that the HO-3 was never received. However, she continued to pay premiums without notifying Hartford that she had not received a copy of the Policy.

The present case splits the difference between Venetian and Tonkovic. McArdle does not claim that Hartford changed the terms of the Policy, but she does claim that she never knew of the one-year limitation period. While, an insured has a duty to understand the terms of a Policy, the Court is reluctant to impose an additional duty of knowing the provisions of a policy that the insured has never seen. The Court recognizes the possibility for abuse by insureds who might always attempt to deny receiving copies of their policies. However, it is difficult to determine what other evidence, besides her affidavit, McArdle could have provided to

demonstrate that she never received the Policy. Therefore, the Court finds that whether McArdle received a copy of the HO-3 is a question of material fact that requires a jury determination. If she did receive the copy, she should be held to the terms of the one-year limit on suits against Hartford. However, giving effect to the previously referred to "manifest in equality" between an insurance company and a purchaser of insurance, if a jury found that she never received the policy, a different outcome relative to the one-year limitation might be required.

2. Policy Exclusions

Hartford also argues that coverage for Plaintiff's damage does not exist under the Policy, which contained the following relevant policies and exclusions:

> SECTION I - PERILS INSURED AGAINST
> Coverage A - Dwelling and Coverage B - Other Structures
> We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not, however, insure for loss:
>
> 2. Caused by:
> b. Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a
> (1) Fence, pavement, patio, or swimming pool
> (2) Foundation, retaining wall, or bulkhead; or
> (3) Pier, wharf or dock'
>
> e. Any of the following:
> (6) Settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs, or ceilings;...

SECTION I - EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by and of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss:

c. **Water Damage,** meaning:

(3) Water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

a. Water Damage Exclusion:

According to Jamison's report to McArdle, the cracks in McArdle's house were "certainly the result of eroded subsoil". The erosion of the subsoil created a cavity. The erosion in turn was likely caused by a direct run-off of water. This rain water run-off was stronger than normal or expected because the underground rain water pipe was completely blocked. In other words, the blocked subsurface drain pipe led to a strong run-off which eroded the soil underneath the house causing a cavity that led to the cracking of the foundation.

McArdle takes the position that the water damage exclusion provision only applies when damage occurs through water's direct pressure on the foundation. Unfortunately, the Policy reads that coverage is excluded for loss caused "directly or indirectly" by water damage. The term water damage, according to the Policy, means water below the surface of the ground. It includes water which "exerts pressure on the foundation, ...", but is not limited to only that kind of subsurface water. The facts of this case are similar to the case of Pavchuk v. State Automobile Ins. Co., 1997 U.S. Dist. LEXIS 10355 (E.D. Pa. 1997). In that case, this Court found that the water from a broken water main had caused sinkholes on the plaintiff's property. The presence of the sink holes caused damage to the home, which was eventually

condemned. This Court upheld the applicability of the water damage exclusion under a policy containing similar provisions. Id. at *8. In the present case, Jamison and NFC attribute the damage to McArdle's home to the "cavity" which resulted from a heavy run-off of water. The run-off was caused by the broken subsurface drainpipe. Therefore, subsurface water indirectly lead to the damage to McArdle's home.

b. Estoppel

In its July 30, 1997 letter to McArdle denying coverage for the Claim, Hartford did not mention the water damage exclusion as a basis for its denial. McArdle now argues that Hartford should be estopped from asserting the water damage exclusion at this point in the litigation. Plaintiff's counsel affirms that, had he known that Hartford would rely upon the water damage exclusion, he would have advised McArdle against filing the present suit.

For estoppel, "the litigant must prove (1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment." United States v. Asmar, 827 F.2d 907, 912 (3d Cir.1987); Monongahela Valley Hospital, Inc. v. Sullivan, 945 F.2d 576, 589 (3d Cir.1991). In the insurance context:

> "to work an estoppel, there must be such conduct on the part of the insurer as would, if the insurer were not estopped, operate as a fraud on some party who has taken or neglected to take some action to his own prejudice in reliance thereon. Accordingly, an insurer is not estopped to deny liability on a policy where the plaintiff was not misled by the defendant's conduct." In re: Muratone Co., Inc., 198 B.R. 871 (E.D. Pa. 1996).

In the context of an insurer's failure to assert all possible defenses to coverage, the courts apply estoppel only when the insured detrimentally relies upon such a representation. See Mendel v. Home Ins. Co., 806 F.Supp. 1206, 1215 (E.D. Pa. 1992). Under Pennsylvania law the burden

rests on the party asserting estoppel to establish the defense by "clear, precise and unequivocal evidence." Chrysler Credit Corp. v. First Nat. Bank and Trust Co., 746 F.2d 200, 206 (3d Cir. 1984).

Hartford will not be estopped from relying on the water damage exclusion. McArdle can point to no actual misrepresentation on the part of Hartford. First, Hartford reserved all of its rights, including all exclusions under the Policy, in its letter of April 14, 1997 to McArdle. Secondly, Hartford mentioned three exclusions under which the Policy denied coverage to McArdle's Claim in its Denial Letter. Hartford never stated that these were the only possible exclusions upon which it might rely or that it no longer reserved its other rights under the Policy. Therefore, the Court finds that McArdle did not reasonably rely on Hartford's "non-mention" of the water damages exclusion when it brought this present suit. An insured has a duty to know the contents of its insurance policy. See Standard Venetian, 469 A.2d at 565. McArdle, especially after engaging representation, might have realized that the water damage exclusion would eliminate her claim from coverage, even without Hartford mentioning it as a basis for denial. In any case, McArdle does not show through clear and unequivocal evidence that Hartford should be estopped from relying on a policy exclusion because she reasonably relied on a misrepresentation. McArdle's attorney presented an affidavit that the suit would not have been filed if Hartford had not withheld information. However, after seeing how vigorously McArdle argued against the applicability of the water damage exclusion in her brief opposing Hartford's motion, the evidence is not unequivocal that she would not have brought a breach of contract claim against Hartford even if the insurer had been more clear about its reliance on the water damage exclusion. Therefore, Hartford will not be estopped.

B. Bad Faith Claim

A statutory remedy exists for bad faith on the part of insurers pursuant to 42 Pa. C.S.A. § 8371. The section provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> > (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> > (2) Award punitive damages against the insurer.
> > (3) Assess court costs and attorney fees against the insurer.

In the insurance context, the term bad faith has acquired a particular meaning:

> "Bad faith" on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith. See Terletsky v. Prudential Property and Cas. Ins. Co., 649 A.2d 680, 688.

In order to prevail, the plaintiff must demonstrate "(1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis." Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir.1997). The plaintiff must demonstrate bad faith by the clear and convincing standard. See Quaciari v. Allstate Ins. Co., 998 F.Supp. 578, 581 (E.D. Pa. 1998).

Hartford did not disregard McArdle's Claim and fail to investigate. It investigated the Claim soon after its submission. After an initial inconclusive report on the cause of damage, Hartford's Correll then engaged an engineering firm (NFC) to investigate. Less than three

months after the Claim was submitted, Hartford indicated to McArdle that her Claim was most likely not covered. The Denial Letter that followed two months later confirmed this initial understanding. The Court has found that Hartford reasonably excluded McArdle's Claim based on the water damage exclusion. Even if Hartford had been found to have incorrectly denied coverage, the Court finds no basis to conclude that Hartford did so in bad faith. Therefore, summary judgment on McArdle's bad faith claim will be entered in favor of Hartford.

IV. CONCLUSION

Hartford did not breach its contract of insurance with McArdle when it used the water damage exclusion to deny her coverage. Therefore, McArdle can not prevail on her bad faith claim either. Accordingly, Hartford's Motion will be granted in its entirety and McArdle's denied in its entirety.

An appropriate order follows.

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	:	
Defendant.	:	

O R D E R

AND NOW, this 22nd day of March, 2000, upon consideration of Plaintiff's Motion for Summary Judgment (Docket No. 7), the Defendant's Response thereto (Docket No. 8), the Defendant's Motion for Summary Judgment (Docket No. 6), and Plaintiff's Response thereto (Docket No. 9), as well as the Reply Briefs of Plaintiff and Defendant (Docket Nos. 10 & 11); it is hereby **ORDERED** that the Plaintiff's Motion is **DENIED** and the Defendant's Motion is **GRANTED**. Judgment is entered in favor of defendant The Hartford Insurance Company of the Midwest and against plaintiff Ann McArdle.

This case shall be marked as **CLOSED.**

BY THE COURT:

RONALD L. BUCKWALTER, J.